

Hylebos Waterway Natural Resource Damage Settlement Proposal and Liability Allocation

The natural resource trustees conducting the natural resource damage assessment for the Commencement Bay environment consist of the National Oceanic and Atmospheric Administration (NOAA) of the U.S. Dept. of Commerce (lead administrative trustee), the U.S. Dept. of the Interior, the Washington Dept. of Ecology (as lead state trustee, also representing the Washington Dept. of Natural Resources and Dept. of Fish and Wildlife), the Puyallup Tribe of Indians, and the Muckleshoot Indian Tribe.

Copies of the trustees' natural resource damage settlement proposal report for the Hylebos Waterway and supporting documents are available for review at two repositories:

Citizens for a Healthy Bay
917 Pacific Ave., Suite 406
Tacoma, WA 98402
Contact: Leslie Rose
Phone: 253/383-2429
Email: lrose@healthybay.org

NOAA Damage Assessment and Restoration Center NW
7600 Sand Point Way NE
Seattle, WA 98115-0070
Contact: Gail Siani
Phone: 206/526-4566
Email: Gail.E.Siani@noaa.gov

Persons wishing to review the documents are asked to phone or email in advance to make an appointment.

A copy of the report can also be downloaded at

www.darcnw.noaa.gov/hylsettl.htm

For more information contact
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NOAA Senior Counsel for Restoration
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Natural resource agencies and Indian tribes propose novel approach to resolving environmental damage claims

As a result of decades of industrial and commercial activity, large areas of the marine sediments of Commencement Bay's waterways have been contaminated with organic chemicals, metals and pesticides. The contamination has affected nearly all of the Commencement Bay ecosystem, from small organisms living in the sediments to the fish, birds and wildlife that directly or indirectly come into contact with the pollution. Parties responsible for the pollution are liable both for the costs of cleaning it up and for the costs of restoring injured natural resources. Under the Superfund law, Congress has authorized certain federal and state agencies and Indian tribes, named as natural resource trustees, to recover those restoration costs through a lawsuit for natural resource damages.

In the case of the Hylebos Waterway, the trustees are trying to avoid the costs, uncertainty and delays of litigation by proposing a novel approach for settling natural resource damage claims out of court. If successful, this approach could produce habitat restoration in Commencement Bay more quickly, more efficiently, and at a lower cost to responsible parties and the public.

● Calculating Natural Resource Damage Liability

At the center of the proposal is this idea: instead of calculating the dollar value of injuries to natural resources (the "damages" of natural resource damages), the trustees determine how much habitat restoration needs to be done to compensate for those injuries. The advantage of this approach is that it focuses settlement discussions on the environment that was injured and will be restored, rather than on disputes over the dollar value of resource injuries. The trustees used a process called *habitat equivalency analysis* to do the calculation.

● Getting to Restoration

The trustees' proposal calls on responsible parties to build restoration projects themselves instead of paying the trustees to do the work. Having other parties handle the contracting and project management avoids the often cumbersome government contracting procedures the agency trustees must follow. It also makes more efficient use of agency and tribal staff, as the trustees can oversee multiple restoration projects other parties are building in the same amount of time it would take the trustees to build just one project themselves.

- **Breaking New Ground**

The novel aspects of the trustees' proposal are that it includes a neutral, independent scheme for allocating liability among Hylebos Waterway facilities, it encourages responsible parties to collaborate and form partnerships to build multi-party projects, and it is being opened to review and comment by responsible parties and the public.

- **Assigning Fair Shares**

Superfund sites like the Hylebos and the other industrial waterways that involve multiple responsible parties sometimes get bogged down in disputes among the parties over how much pollution each party contributed and how much each party must pay to clean it up. To minimize the risk of inter-party disputes the trustees hired a consultant to propose a neutral, independent allocation of liability. The trustees' allocation assigns to each facility on the waterway that contributed to the pollution a share of the responsibility for creating the habitat restoration needed to compensate for resource injuries. Where multiple parties share liability for a facility, the trustees are depending upon responsible parties to determine how that liability should be apportioned among themselves.

- **Collaborating to Save Costs and Build Better Projects**

Collaboration by multiple parties to build bigger restoration projects has benefits for the parties and the environment. Bigger projects can often be built for lower costs per unit, lowering the costs for all participants. Many biologists also say that bigger restoration projects are better because the different parts of the project can interact in ways that make the ecological value of the whole project worth more than if the parts were built separately.

One of the responsible parties has told the trustees it is willing to build a restoration project that appears larger than what it would need to satisfy its allocated share of liability. The trustees are willing to let other responsible parties satisfy their liability by in essence buying shares in the project. Because the trustees' focus is on the amount of restoration built, and not on the number of dollars collected, this leaves collaborating parties free to negotiate with each other the costs of participation. This way the public gets the habitat restoration it is owed, while the private parties work out the financing on the best terms they can arrange.

- **Seeking Input From Responsible Parties and the Public**

The trustees are making their proposal available for public review and comment. Copies of the proposal were mailed to interested parties and are being made available for review at locations in Tacoma and Seattle. The trustees are holding a public briefing on the proposal and have posted copies of their proposal report on an agency web site. The trustees believe that if they explain ahead of time how they developed their claims, negotiations with responsible parties will go more quickly and efficiently, and the public will have faith that the trustees have done a good job of promoting the public interest.

Commenting on the Proposal

Comments will be accepted through close of business **May 16, 2002**. Comments should be in writing and addressed to:

Hylebos NRDA Settlement Proposal Comments
Attn: Ms. Gail Siani
NOAA Damage Assessment and Restoration
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Seattle, WA 98115-0070
or by email to
Gail.E.Siani@noaa.gov